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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of Knight Newspapers, Inc.,

Appellant,

—v.—

PAT L. TORNILLO, JR.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR NEW YORK NEWS INC., AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	PAGE
I. Statement	1
II. Interest of the *Amicus*	2
III. Argument	2
A. The Historical Foundation of the First Amendment Does Not Support the Florida Supreme Court's Decision	2
1. The First Amendment Was Established as a Restraint on Government, Rather Than as an Affirmative Right Conferred Upon Individuals	2
2. The First Amendment Has Protected the Function of the American Press as Critic of Government	4
B. F.S. § 104.38 Abridges the First Amendment Guarantee of Freedom of the Press	6
IV. Conclusion	17

TABLE OF AUTHORITIES

Cases:

Associates & Aldrich Company v. *Times Mirror Company*, 440 F.2d 133 (9th Cir. 1971) 13, 14

Avins v. *Rutgers, State University of New Jersey*, 385 F.2d 151 (3rd Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) 13

PAGE

Bridges v. *California*, 314 U.S. 252 (1941) 4

Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. *Chicago Tribune Company*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971) 6, 12

Columbia Broadcasting System v. *Democratic National Committee*, 412 U.S. 94 (1973) 9, 11

Grosjean v. *American Press Co.*, 297 U.S. 233 (1936) 14

Lovell v. *Griffin*, 303 U.S. 444 (1938) 4

Mills v. *Alabama*, 384 U.S. 214 (1966) 14

Near v. *Minnesota*, 283 U.S. 697 (1931) 4, 14

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 8

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 14

Opinion of the Justices to the Senate, 298 N.E.2d 829 (Mass. 1973) 13

Pittsburgh Press Co. v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) 10, 15

Resident Participation of Denver, Inc. v. *Love*, 322 F. Supp. 1100 (D. Colo. 1971) 6, 12

Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971) 7

PAGE

Statutes:

Section 104.38, Florida Statutes 1, 6, 9, 17

Other Authorities:

Barron, "Access to the Press—A New First Amendment Right", 80 Harv. L. Rev. 1641 (1967) 11

Chafee, *Free Speech in the United States* (1964) 5

Thayer, *Legal Control of the Press* (1944) 3

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I.

Statement

New York News Inc. submits this brief as *amicus curiae,* with the written consent of the parties under Rule 42, to urge reversal of the judgment of the Florida Supreme Court on the ground that Florida Statute 104.38 is an invasion of the freedom of the press protected by the First Amendment.

II.

Interest of the *Amicus*

New York News Inc. publishes the *Daily News* and the *Sunday News* (collectively "The News") in New York City, two newspapers with the largest circulation of any daily or Sunday paper in the United States. The News is one of three daily English-language newspapers published in New York City. A wide choice of news coverage and editorial views is offered by The New York Times, New York Post and The News, as well as the large number of suburban newspapers which circulate widely in the region.

While copies of The News are sold in Florida, it is not considered that these newspapers are within the direct reach of the Florida statute. Nevertheless, a decision upholding the validity of that statute would inevitably lead to far-reaching demands for the enactment of similar laws, even on a federal basis.*

The News' objections to the Florida statute arise from its coercive nature and its criminal sanctions, not from any philosophical rejection of the idea of a balanced presentation of political campaigns and candidates. As a newspaper it considers that it has consistently operated in a manner entirely harmonious with the rather crudely expressed objectives of the Florida statute.** But like most newspapers,

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* Senator McClellan has already publicly called for a national "right to reply" law requiring newspapers to publish the replies of public figures who are criticized in stories or editorials. *Broadcasting*, February 11, 1974, p. 28. Senator Cranston quickly announced his opposition. *Editor & Publisher*, February 16, 1974, p. 12.

** For example, for many years The News has run a "Battle Page" during important election campaigns, in which equal amounts of space were provided to the principal political parties for publication of their own uncensored and unrevised statements.

The News objects strenuously to having any agency of government dictate its content. It is prepared to answer for that content not only in court, where it may be challenged for defamation, contempt of court or other recognized restrictions on complete freedom of publication, but also to its readers, who demand nothing less than a balanced presentation of the news. It is unwilling, however, to accept government-imposed restraints on its own independent editorial judgment.

III.

ARGUMENT

A. *The Historical Foundation of the First Amendment Does Not Support the Florida Supreme Court's Decision.*

1. The First Amendment Was Established as a Restraint on Government, Rather Than as an Affirmative Right Conferred Upon Individuals

During the latter half of the Eighteenth Century, the American Colonists became increasingly aware of the potential restraints which government could impose upon individuals for publishing any criticism of their political rulers. Although the Star Chamber in England had been abolished in 1641, the law of treason was still invoked to restrict liberty of the press. Thayer, *Legal Control of the Press* 10 (1944). The widely publicized trial of John Peter Zenger in 1735 tended to crystallize popular opinion in favor of independence of the press from governmental harassment and interference.

It seems clear that people's fear and distrust of centralized government as a licensor or censor was a leading reason for the adoption and the precise wording of the First

Amendment: "Congress shall make no law . . . abridging the freedom . . . of the press". *Lovell* v. *Griffin*, 303 U.S. 444, 451-452 (1938). Although not absolute of application, the wording of the First Amendment is direct and unequivocal. "It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U.S. 252, 263 (1941). In exalting the role of the press by clothing it with special protection distinct from freedom of speech, James Madison, the midwife of the First Amendment, proclaimed:

> " 'Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the states, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness?' "

Quoted in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931).

The framers of the First Amendment recognized the possibility of abuses by the press, but affirmatively decided that the press must be free to publish what it deemed to be

in the interest of the people as a check on governmental abuse of power. Certainly, there is no hint that the founding fathers considered that "liberty of the press" encompassed a right of government to force open newspaper offices to anyone, however worthy, or to commandeer a newspaper's presses for any reason, however enticing.

2. The First Amendment Has Protected the Function of the American Press as Critic of Government

England's attempts to imprison Zenger and John Wilkes under the odious sedition laws led the draftsmen of the First Amendment to attempt to "make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America". Chafee, *Free Speech in the United States* 21 (1964). And in 1791 the First Amendment came into being.

Popular rejection of the Sedition Acts of 1798 reinforced the role of the press as an independent check on the vagaries and abuses of government. Chafee, *supra* 27. In commenting upon the traditional role of the press in our society, the Seventh Circuit quoted with approval from the District Court's opinion:

> "'Rather than regarded as an extension of the state exercising delegated powers of a governmental nature, the press has long and consistently been recognized as an independent check on governmental power. "The right of free public discussion of the stewardship of public officials was * * *, in Madison's view, a fundamental principle of the American form of government." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 275 (1964). So it is that the national policy favoring full and frank exercise of the press' freedom "may well

include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." . . .

In sum, the function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation.'" *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO* v. *Chicago Tribune Company*, 435 F.2d 470, 474 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

The acceptance of a principle which perceives a role for government (whether executive, legislative, or judicial) as an innocent and beneficent intervenor on behalf of oppressed and disenfranchised individuals is not only unjustified by an analysis of our history as a people but is expressly refuted by the clear command of the First Amendment. This Court should reject the direct interference with editorial judgment proposed by appellee and reaffirm that "the historic function of newspapers, like the pamphlets of a prior day, has been to oppose government, to be its critic not its accomplice." *Resident Participation of Denver, Inc.* v. *Love*, 322 F. Supp. 1100, 1105 (D. Colo. 1971).

B. *F.S. § 104.38 Abridges the First Amendment Guarantee of Freedom of the Press*

The Florida Supreme Court found that F.S. § 104.38 "*assures*, and *does not abridge*, the right of expression which the First Amendment guarantees" and that it "sup-

ports the freedom of the press in its true meaning . . ." (emphasis in original). Appellee contends that the Florida statute does not infringe upon editorial discretion, and a newspaper would incur only minor inconvenience or slight financial hardship from being coerced into providing free space for self-serving statements by political candidates. *Amicus* submits that, on the contrary, the true meaning of the expression "freedom of the press" would not be assured or supported by this oppressive law, and its application would infringe impermissibly upon press liberty.

As this Court has observed, "The very possibility of having to engage in litigation,"—to say nothing of having to pay a fine or go to jail—"an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance." *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971). No editor can fail to be deterred by a statute which threatens him with these sanctions if he allows the "personal character of a candidate" to be "assailed" or if his newspaper charges "misfeasance" or criticizes the "official record" of the candidate. Whatever may be said for the point of view that a right of access to the media should be afforded the private individual who has been libeled, *cf. Rosenbloom*, at 47 n.15, the creation of a special privilege of reply for political candidates cannot avoid "stifling public discussion of matters of public concern." (*Id.* at 47.) And since the statute grants this right to those who have created it—candidates and officials who have themselves felt the sting of critical comments on their records and work—the Court should be especially wary of accepting the determination below that a need exists for such a law.

If political candidates are to be provided with a government-compelled platform to respond to criticism, there is no reason why other sectors of society should be denied a similar privilege. The novelist whose work has been criticized, the actor whose performance has been panned, even the baseball player whose skills have been publicly doubted in the sport columns, all may claim a similar privilege to repel attacks on their "official record". Historically, and long before *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the common law recognized these criticisms were not defamations, at least in the absence of some showing of malice. Under such laws newspapers will be made into pallid compilations of the pros and cons of every issue, from the political to the artistic.

Nor should the Court accept the suggestion from appellee that only minor inconvenience or economic disadvantage will result from the Florida statute. The impression seems to be that newspapers have unlimited white space which can be easily opened up to the candidate who claims a right to response. It is not that easy. Especially for tabloid newspapers like those published by this *amicus*, tightly written and edited, space is at a premium. An edict that a candidate must be given a chance to reply to what the paper said about him can cause havoc. Since under the statute the reply must be "in as conspicuous a place" as the original charge, the result will be to crowd from the main news page a more current and important story, pushing it to a back page, with eventual displacement of either news or advertising. The newspaper will not run an extra four pages to carry a two-column reply; therefore, another story will not be published, or some advertising will be dropped, and on a regular basis this can be a serious economic problem.

To uphold this statute as only a modest infringement on editorial independence, suggests a reference to Mr. Justice Douglas' warning about the camel's head in the tent. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 148, 154 (1973) (concurring opinion). When governmental officials begin to require newspapers to publish or not publish certain kinds of articles, the door to abuses is open.

The Florida Court may have felt that this statute had a benevolent purpose, specifically, to provide more opportunity for the raising of differing viewpoints. But the attempt to achieve this goal through governmental interference with editorial discretion is barred by the First Amendment. Any public malaise resulting from an alleged lack of access to the press cannot be cured by government censor or government sanction.

The Florida Supreme Court viewed the fundamental purpose of the First Amendment to be "to inform the people" (App. 13), and found this underlying value to be served by F.S. § 104.38. However, in reaching this conclusion, that Court ignored not only the express wording of the Amendment, but also the historic and precedential interpretations of that wording. The Florida Court has, in effect, rendered this precise wording meaningless by promoting a beneficial value normally gained through strict adherence to the First Amendment. In exalting the desirable goal of open and diverse discussion, the Florida Court has allowed the hand of government to help set the type of the state's newspapers. Only last term, Mr. Justice Stewart warned against adopting invalid means to achieve beneficial results.

> "It is said that the goal of the Pittsburgh ordinance is a laudable one, and so indeed it is. But, in the words

> of Mr. Justice Brandeis, 'Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.' *Olmstead* v. *United States*, 277 U.S. 438, 479 (dissenting opinion). And, as Mr. Justice Black once pointed out, 'The motives behind the state law may have been to do good. But . . . [h]istory indicates that urges to do good have led to the burning of books and even to the burning of "witches".' *Beauharnais* v. *Illinois*, 343 U.S. 250, 274 (dissenting opinion)." *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376, 400, 403 (1973) (dissenting opinion).

Appellee urges upon this Court a novel and almost unique interpretation of the First Amendment. From appellee's viewpoint, the First Amendment provides to each citizen a right of access to the press through governmental sanction. This Court should not approve such a blatant effort to bypass the well established protection of the press in order to graft onto the First Amendment an allegedly laudable value in disregard of its express mandate. Indeed, Mr. Justice Stewart recently answered the very argument made here by appellee.

> "Perhaps [the] 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible.' And perhaps it would require that such access be compelled

only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government.

"I profoundly trust that no such reasoning as I have attributed to the Court of Appeals will ever be adopted by this Court. And if I have exaggerated, it is only to make clear the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values.'

"Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice." *Columbia Broadcasting System, Inc.* v. *Democratic National Committee, supra* at 145-146 (concurring).

This claimed constitutional right of access has apparently been recognized only by the Florida Supreme Court and appellee's counsel. Barron, "Access to the Press—A New First Amendment Right", 80 Harv. L. Rev. 1641 (1967). Indeed, one three-judge District Court has explicitly rejected Professor Barron's theory.

"We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peace-

ful citizens to engage in violence to get their views to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable." *Resident Participation of Denver, Inc.* v. *Love, supra* at 1105.

Other decisions also have found no First Amendment right of access to newspapers. In *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO* v. *Chicago Tribune Company, supra,* plaintiff-union demanded that various newspapers in Chicago publish the union's editorial advertisement. In addition to rejecting plaintiff's First Amendment argument based on defendants' alleged state action in refusing its advertisement, the Court of Appeals also dismissed a right-of-access claim by an *amicus curiae.*

"It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. . . . The

Union's right to free speech does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." 435 F.2d at 478.

The Court of Appeals for the Ninth Circuit found no inherent right of an individual to commandeer private newspapers for publication of his parochial, political or even commercial point of view. *Associates & Aldrich Company* v. *Times Mirror Company,* 440 F.2d 133 (9th Cir. 1971).

The Third Circuit, in emphatic language, denied the right of an individual to force the editors of the Rutgers Law Review to accept and publish an article. "The right to freedom of speech does not open every avenue to one who desires to use a particular outlet for expression." *Avins* v. *Rutgers, State University of New Jersey,* 385 F.2d 151, 153 (3rd Cir. 1967), *cert. denied,* 390 U.S. 920 (1968).

Last year, the Massachusetts Supreme Judicial Court considered proposed legislation which would have required newspapers to accept responsive paid political advertisements. Rejecting arguments almost identical to those asserted here by appellee, that Court found the law would have violated the First Amendment. *Opinion of the Justices to the Senate,* 298 N.E.2d 829 (Mass. 1973). The Massachusetts court firmly rejected the proposed law and stated:

"[C]ompulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be

> published. • • • Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement." 298 N.E. 2d at 835.

This Court has repeatedly invalidated laws or governmental action which constituted prior restraint on the press. *E.g., Near* v. *Minnesota, supra; New York Times Co.* v. *United States,* 403 U.S. 713 (1971). Also, this Court has been swift to defend the liberty of the press from indirect prior restraints. *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). Furthermore, this Court should find, as did the Ninth Circuit in *Associates & Aldrich Company* v. *Times Mirror, supra,* at 135, that no legal or practical distinction results from either *compelling* publication of certain material or *prohibiting* a newspaper from printing certain articles. Cf. *Rosenbloom* v. *Metromedia, supra* at 52-53.

The Florida Supreme Court has elevated this newly-claimed right of "access to the press" to a level which supersedes our traditional right of liberty of the press. Confronted with a similar opportunity to limit the press' liberty in furtherance of an allegedly beneficial value, this Court defended the traditional First Amendment right. *Mills* v. *Alabama,* 384 U.S. 214 (1966). There the Alabama Corrupt Practices Act prohibited the publication of newspaper editorials on election day. Appellant faced criminal charges for printing such an editorial urging the voters to adopt the mayor-council form of government. The Alabama Supreme Court found the law to be a reasonable restriction on the press and, in fact, aided the citizen's right to vote by reducing last minute, possibly inaccurate charges

which could not be refuted due to lack of time. In rejecting beneficent motives as a permissible justification for governmental intrusion upon editorial judgment, this Court reaffirmed the important position which the Constitution mandates for the American press.

> "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, see *Lovell* v. *Griffin,* 303 U.S. 444, to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free. The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." 384 U.S. at 219.

Indeed, only last term this Court reaffirmed the role that the Constitution accords to freedom of the press. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations, supra.* Despite approving narrow governmental

regulation in commercial decisions of newspaper management, Mr. Justice Powell stressed the limited application of the Court's opinion:

> "We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission or the propriety of sex preferences in employment. Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists or its contributors. On the contrary, we affirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press." 413 U.S. at 391.

Appellee's counsel can submit a handful of law review articles, but he can point to no judicial authority to support his inventive theory of a constitutional right of access to newspapers. This Court should not recognize and affirm a novel constitutional right at the expense of one of our most respected and enduring freedoms.

IV.

CONCLUSION

The judgment of the Florida Supreme Court and its interpretation of the constitutionality of Florida Statute 104.38 were not based on the fundamental principles of the First Amendment or any persuasive precedent; they impermissibly depart from the express prohibition of the First Amendment. This Court should reverse the judgment of the Florida Supreme Court and declare Florida Statute 104.38 unconstitutional.

Respectfully submitted,

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